

## V. Social Media Use and Advertising

### A. Can/Should You “Friend” a Judge on Facebook?

First, it is always helpful to review the relevant Indiana Rules of Professional Conduct:

#### **Rules of Professional Conduct**

*Including Amendments made through January 1, 2013*

([http://www.in.gov/judiciary/rules/prof\\_conduct/prof\\_conduct.pdf](http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf), accessed 10/29/13)

#### **Rule 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
  - (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, duress or harassment.
- (d) engage in conduct intended to disrupt a tribunal.

#### **Comment**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

It is also helpful to review recent articles and ethics opinions that address issues related to social media from the perspective of the state where the lawyer practices. For example, a good overview on the ethics of social media use was provided by the Indiana State Bar Association's Legal Ethics Committee. (Legal ethics involved in online social media and networking: An

overview. *Res Gestae*, 54(7), p. 29, March 2011). Among the issues that an attorney needs to consider when “friending”, including for investigation someone (plaintiff, witness, judge) or for networking, are the duty of candor, *ex parte* communications and the appearance of impropriety. (Patrick, W.L. What are “friends” for? *California Lawyer*, Dec. 2011, <http://www.callawyer.com/Clstory.cfm?eid=919354>, 11/5/13). Barone also discusses the need for care when “friending” between attorneys and judges. (Barone, P.T. Judges and lawyers must exercise caution as Facebook “friends”. *SADO: Michigan State Appellate Defender Office and Criminal Resource Center*, <http://www.sado.org/articles/Article/100>, accessed 11/5/13). Another issue may be whether there is a difference between various social media vendors. For example, the premise of LinkedIn and its overall content is intended for professional purposes while Facebook and other sites may tend to contain more personal information and perhaps less formality about the kinds of information that are shared and caution in making connections.

The American Bar Association recently issued Formal Opinion 462 related to a judge’s use of social media. (ABA Formal Opinion 462, Judge’s Use of Electronic Social Networking Media, Feb. 21, 2013, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf), accessed 11/5/13). After a thorough examination of the issue, the Opinion clarified that, “although judges may utilize electronic social networking sites, they must comply with the relevant provisions of the Code of Judicial Conduct and avoid conduct that would undermine their independence, integrity, impartiality and/or create any appearance of impropriety. In particular, it cautioned the extent of their participation. Depending on their interaction with other contacts in the legal profession who have pending or impending matters before the court, they might be compelled to disclose such relationships.” (E-Discovery Resource

Database, <http://ediscoveryresourcedatabase.com/2013/02/21/aba-formal-opinion-462-judges-use-of-electronic-social-networking-media/>, accessed 11/5/13). The Opinion discusses several factors for judges to consider when using social media, including publicly endorsing or opposing candidates for public office, not giving the impression that they can be influenced by certain people or groups, avoiding ex parte communications concerning pending matters, and not using social networking sites to obtain information about matters before them. (Weiss, D.C. Should judges disclose Facebook friends? “Context” is significant, ABA Ethics Opinion says. *ABA Journal*, Feb. 26, 2013, [http://www.abajournal.com/news/article/should\\_judges\\_disclose\\_facebook\\_friends\\_context\\_is\\_significant\\_aba\\_ethics\\_o/](http://www.abajournal.com/news/article/should_judges_disclose_facebook_friends_context_is_significant_aba_ethics_o/), accessed 11/5/13). Judges should also consider whether to disclose their social media relationships with lawyers or parties in pending matters, although the informal nature of these connections may not rise to the level that a personal, face-to-face relationship would. (Id.) In addition to these concerns, “[j]udges should also be aware that their comments, images and profile information may be transmitted without their knowledge to others. If the material proves embarrassing, it has the potential to undermine public confidence in the judiciary and to compromise the independence of the judge, the opinion says.” (Id.)

According to Lewis, “[t]he states that have considered whether judges can use social networking sites generally have concluded that they may do so. They diverge, however, when considering whether judges must recuse themselves if they have friended a lawyer who appears before them.” (Lewis, S.C. When judges “friend” lawyers: must recusal necessarily follow? *Rivkin Radler*, June 18, 2013, <http://www.rivkinradler.com/publications.cfm?id=1184>, accessed 11/5/13). She discusses the variety of opinions issued in Florida, Kentucky, Ohio, Maryland, California and New York. Florida is an interesting situation, since the Florida Supreme Court is

being asked to consider whether being Facebook friends with a prosecutor who then appears in the judge's courtroom for a case constitutes a conflict of interest and should be grounds for recusal. (Stone, R. Is Facebook friending between judges and trial lawyers improper? Even in 2013? *WRLN*, Jan. 18, 2013, <http://wlrn.org/post/facebook-friending-between-judges-and-trial-lawyers-improper-even-2013>, accessed 11/5/13). "The appeals court removed Judge Andrew Siegel of Broward County from a case in September because he was Facebook friends with the prosecutor. Its decision cited a judicial ethics opinion that judges should not friend lawyers who appear before them. According to the appeals court, the ethics opinion recognized that friending could undermine confidence in a judge's neutrality." (Weiss, D.C. Should a judge recuse due to Facebook friendship with prosecutor? Florida Supremes asked to decide. *ABA Journal*, Jan. 17, 2013, [http://www.abajournal.com/news/article/should\\_a\\_judge\\_recuse\\_due\\_to\\_facebook\\_friendship\\_w](http://www.abajournal.com/news/article/should_a_judge_recuse_due_to_facebook_friendship_with_prosecutor_florida_su/)  
[ith\\_prosecutor\\_florida\\_su/](http://www.abajournal.com/news/article/should_a_judge_recuse_due_to_facebook_friendship_w/ith_prosecutor_florida_su/), accessed 11/5/13, see *Pierre Domville v. State of Florida*, No. 4D12-556, (Fla. Dist. Ct. App. Sept. 5, 2012).

#### B. Can/Should You Use Group Coupon or Daily Deal Marketing?

A newly published Formal Opinion from the American Bar Association provides guidance on whether attorneys are allowed to use these kinds of marketing approaches. (ABA Formal Opinion 465, Lawyers' Use of Deal-of-the-Day Marketing Programs, Oct. 21, 2013, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_465.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_465.authcheckdam.pdf), accessed 11/5/13). As stated in the Conclusion, "[t]he committee believes that coupon deals can be structured to comply with the Model Rules. The committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be

structured to comply with all ethical and professional obligations under the Model Rules.” (Id.)

Several other ethical issues are identified in the Formal Opinion, including “the need to make sure the marketing statements are accurate. The scope of services offered must be clearly defined and the circumstances for refunds described, the opinion says. And the ad should explain that no client-lawyer relationship exists until a consultation takes place.” (Weiss, D.C. Can lawyers use Groupon-type marketing? ABA ethics opinion sees problems with prepaid deals. *ABA Journal*, Oct. 21, 2013, [http://www.abajournal.com/news/article/can\\_lawyers\\_use\\_groupon-type\\_marketing\\_aba\\_ethics\\_opinion\\_sees\\_problems/](http://www.abajournal.com/news/article/can_lawyers_use_groupon-type_marketing_aba_ethics_opinion_sees_problems/), accessed 11/5/13). However, the opinion “does not say that lawyers are forbidden to use sites like Groupon to promote themselves, but that deals need to be carefully structured to avoid problems and that it might not be possible to overcome those obstacles.” (Gershman, J. Lawyers and Groupon deals may be a difficult mix. *The Wall Street Journal Law Blog*, Oct. 21, 2013, <http://blogs.wsj.com/law/2013/10/21/lawyers-and-groupon-deals-may-be-a-difficult-mix/>, accessed 11/5/13). Commentary indicates that some people are concerned that the opinion has resulted in more ambiguity about what is permissible rather than clear guidance that helps attorneys comply with the ethical rules as well as the differences between coupon deals and prepaid deals. (Lawyers on Groupon: The ABA adds to the confusion. *The Cyber Advocate*, Oct. 25, 2013, <http://www.thecyberadvocate.com/2013/10/25/lawyers-on-groupon/>, accessed 11/5/13).

On the other hand, a New York Ethics Opinion allows lawyers to offer Groupon deals, with some cautions. (Ethics Opinion 897, New York State Bar Association, 12/31/11, <http://lawyersusaonline.com/wp-files/pdfs-3/opinion-no-897.pdf>, accessed 11/5/13). Among the specific issues covered in the opinion are whether the money retained by the website is an improper payment for a referral, whether this constitutes an excessive fee, compliance with rules

regulating advertising and premature and improper formation of a lawyer-client relationship.

(Id.) According to the opinion,

A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation. (Weiss, D.C. May lawyers offer Groupon deals? New York Ethics Opinion allows it, with caveats. *ABA Journal*, Jan. 26, 2012, [http://www.abajournal.com/news/article/may\\_lawyers\\_offer\\_groupon\\_deals\\_new\\_york\\_ethics\\_opinion\\_allows\\_it\\_with\\_cav/](http://www.abajournal.com/news/article/may_lawyers_offer_groupon_deals_new_york_ethics_opinion_allows_it_with_cav/), accessed 11/5/13).

North Carolina and South Carolina have also issued recent opinions on ethics of using daily deal coupons. As stated in South Carolina Ethics Advisory Opinion 11-05, “[t]he use of daily deal websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed.” (Harris, M.D. Coupons for lawyers: three ethics opinions approve daily deal advertising for lawyers. *Litigation News*, 37(2), pp. 1-3, Winter 2012). In terms of North Carolina’s stance on this issue and others as compared with the ABA’s Model Rules,

ABA Model Rule Update	NC Ethics Opinion
<a href="#">Rule 1.6</a> – Attorneys must protect confidential information from unauthorized 3rd party access; must make “reasonable efforts” to keep confidential information secure	<a href="#">RPC 215</a> (1995) – protecting confidential information in wireless transmissions <a href="#">2008 FEO 5</a> – regarding web-based management of client information
<a href="#">Rule 1.18</a> – Attorney-client relationship likely established where person submits representation-related information in response to	<a href="#">2000 FEO 3</a> – regarding whether attorney posting responses to questions on permanent internet bulletin board establishes attorney-

specific attorney inquiry or where no disclaimer provided Attorney-client relationship likely <i>not</i> established where submission is response to general attorney advertisement or attorney only provides legal info of general interest	client relationship <a href="#">2011 FEO 8</a> – regarding “live chat” services on attorney website
<a href="#">Rule 4.4</a> – Extending definition of documents sent inadvertently to opposing counsel to electronic documents, emails and attachments. Narrows requirements to avoid review and use of metadata sent by opposing counsel unless attorney knows/should know that info sent inadvertently	<a href="#">2009 FEO 1</a> – More strict rule in NC regarding metadata (treats metadata the same as any other electronic document; holds that attorney who searches metadata of electronic documents in search of confidential information is in violation of Rules), otherwise same as ABA*
<a href="#">Rule 5.3</a> – Extends attorney’s duty regarding external non-legal assistance to use of 3rd party companies for document management, cloud storage, and other software that has access to client information. Extent of duty is situational and fact specific	<a href="#">2007 FEO 12</a> – addresses generally a lawyer’s duties when outsourcing any work, to lawyers and non-lawyers alike <a href="#">2011 FEO 6</a> – addresses lawyer’s duties when contracting with Software-as-a-Service companies for retention and management of client information
<a href="#">Rule 7.2</a> – Lawyers may pay 3rd party customer-generation companies, but ads created by 3rd parties subject to same rules as attorney advertising alone	<a href="#">2011 FEO 10</a> – Essentially the same rule, but specifically addressing an attorney’s ability to advertise in group coupon (aka Groupon)-like services (it is permitted, provided the ads, and the payment therefore, comply with rules regarding attorney advertisement and payments to non-lawyers)
<a href="#">Rule 7.3</a> – Addressing improper attorney solicitation, specifically that use of advertising systems that automatically generate an ad based on particular search terms (read: user inputs) is NOT improper solicitation, absent other factors	<a href="#">2010 FEO 14</a> – Essentially the same rule, but establishes that the specific search terms the ad relies on must comply with ethical duty not to mislead  (The example is an attorney ad that uses a competing attorney’s name as a trigger to bring up the ad – such conduct is deemed misleading)

<http://www.thecyberadvocate.com/2013/07/29/abas-ethical-use-of-technology-update/>, accessed 11/5/13).

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<http://www.groupon.com/deals/dynamic-lawyers>
[Dynamic Lawyers Deal of th...](#)

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Get the Daily Deal for:

Indianapolis

SUBSCRIBE

GROUPON

What are you looking for?

Indianapolis, IN

SIGN IN

SIGN UP

All Deals

Goods

Getaways

Groupon is 5!

Dynamic Lawyers - Ottawa

\$24 for a Create-Your-Own Custom Will Package from Dynamic Lawyers (\$109.61 Value)

C\$24

NO LONGER AVAILABLE

VALUE

DISCOUNT

YOU SAVE

C\$109

78%

C\$85

GIVE AS A GIFT

LIMITED QUANTITY AVAILABLE

Over 790 bought

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In a Nutshell

Easy-to-use online program guides users through customizing a will while offering helpful information about the process

The Fine Print

Now, Search 1,000s of Top-Rated Getaways

BOOK NOW

GROW YOUR BUSINESS WITH Groupon

GET STARTED

More Great Deals

See All

Manduka.com

Online Deal



http://www.groupon.com/deals/dynamic-lawyers

Dynamic Lawyers Deal of th...

## The Fine Print

Expires Jul 10th, 2013. Limit 1 per person; spouses require individual Groupons for individual wills. Not valid until 7/13/12. See for [terms and conditions of service](#). Merchant is solely responsible to purchasers for the care and quality of the advertised goods and services. See the [rules](#) that apply to all deals.

Wills help people pass on prized possessions to trusted confidantes, so that their motorcycle doesn't end up in the junkyard and their diary doesn't end up projected onto the moon. Ensure your belongings end up where they should with this Groupon.

### \$24 for a Create-Your-Own Custom Will (\$109.61 Value)

The [Will-O-Matic Wizard](#) is an online platform that guides users through the process of customizing their last will and testament, aided by a video tutorial and two written guides. After looking at the downfalls of other available will kits, lawyer Michael Carabash specifically designed the Will-O-Matic software to adapt to the nuances of provincial laws and leverage precise language. As clients click through the program, it offers helpful information on each option, giving them the chance to name legal representatives for any minor children, add their own clauses, and otherwise custom-tailor the document.


Once finished, the will is available in PDF format on Dynamic Lawyers' website, and users can go back and edit it for free during the following year. Users don't have to finish in one sitting. Wills are often recommended for anyone with financial assets, but can be especially useful for newlyweds, new families, those traveling abroad, and those who have experienced changes in their financial or family situation.

## Dynamic Lawyers


Company Website

## Reviews

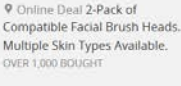
- CTV News feature
- Globe and Mail feature
- Yahoo! News feature
- CFRB1010 Radio feature
- CJAD800 Radio feature
- Financial Post feature




OVER 20 BOUGHT



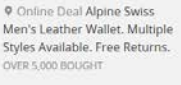
OVER 290 BOUGHT




OVER 1,000 BOUGHT



OVER 5,000 BOUGHT



OVER 5,000 BOUGHT



OVER 5,000 BOUGHT

http://www.groupon.com/deals/zazzle-18

125%

http://www.groupon.com/deals/dynamic-lawyers

Dynamic Lawyers Deal of th...


## Dynamic Lawyers

According to the [Globe and Mail](#), lawyer Michael Carabash was doing his taxes with online software when his cousin gave him an innovative idea: to develop a program that would guide users through creating their own will. Carabash seized on the concept and ran with it. Drawing on his experience in estate planning for his dentist clients, he soon created the [Will-O-Matic Wizard](#), an online program that helps users complete their wills quickly on the computer rather than spending years chiseling them into granite tablets. The new concept of software that helps clients create their own legal documents generated a blitz of [media attention](#).

Following close on the Will-O-Matic software's heels, Dynamic Lawyers' Lease-O-Matic software and other online platforms began enabling Canadians to generate legal documents including [residential agreements](#), [family law agreements](#), and [employment agreements](#). Each software package comes with helpful information—though not legal advice—in the form of e-books, videos, and prompts. Although Dynamic Lawyers is not itself a law firm, it can connect clients with affordable lawyers.

## Dynamic Lawyers

According to the [Globe and Mail](#), lawyer Michael Carabash was doing his taxes with online software when his cousin gave him an innovative idea: to develop a program that would guide users through creating their own will. Carabash seized on the concept and ran with it. Drawing on his experience in estate planning for his dentist clients, he soon created the [Will-O-Matic Wizard](#), an online program that helps users complete their wills quickly on the computer. The new concept of software that helps clients create their own legal documents generated a blitz of [media attention](#). Following close on the Will-O-Matic software's heels, Dynamic Legal Forms' Lease-O-Matic software and other online platforms began enabling Canadians to generate legal documents including [residential](#), [family-law](#), and [employment](#) agreements. Each software package comes with helpful information—though not legal advice—in the form of e-books and prompts.



2 BOUGHT

### Our Promise to You

We're confident in the businesses we feature on Groupon and back them with the Groupon Promise. [Learn More](#)

125%

## C. Can/Should You Use Text Messages to Solicit Prospective Clients?

Indiana Rules of Court  
**Rules of Professional Conduct**  
*Including Amendments made through January 1, 2013*  
([http://www.in.gov/judiciary/rules/prof\\_conduct/prof\\_conduct.pdf](http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf), accessed 10/25/13)

### **Rule 7.3. Direct Contact with prospective Clients**

- (a) A lawyer (including the lawyer's employee or agent) shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
  - (1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:
  - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
  - (2) the solicitation involves coercion, duress or harassment;
  - (3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;
  - (4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or
  - (5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.
- (c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars (\$50.00) payable to the "Supreme Court Disciplinary Commission Fund" shall accompany each such filing. In the event a written, recorded, or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

### **Commentary**

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need

for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated no less than 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

## D. What Are Your Ethical Duties When Using an Internet Directory or Attorney-Client

### Matching Site?

According to Wikipedia,

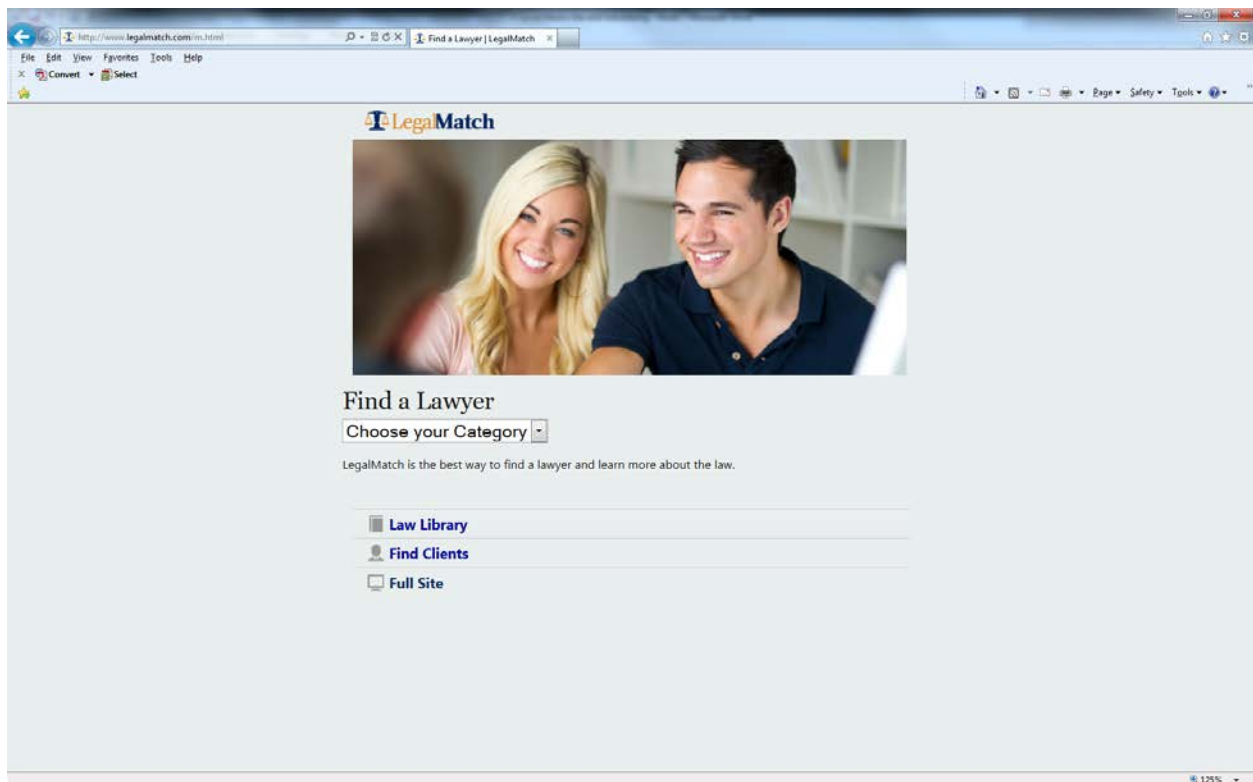
Attorney-client matching (ACM), which has sometimes been referred to as online legal matching, is a subset of legal advertising that allows participating attorneys to be matched with potential clients seeking legal representation. ACM websites allow users to submit their legal needs online by practice area and location. Law firms or lawyers that opt to use these services are then matched with clients by need and location. (Attorney-Client

Matching, *Wikipedia*,

[http://en.wikipedia.org/wiki/Attorney%E2%80%93client\\_matching](http://en.wikipedia.org/wiki/Attorney%E2%80%93client_matching), accessed 11/6/13).

Wikipedia notes that one concern with these matching services is client confidentiality. (Id.) A number of these ACM services now exist. An example of one of these ACM services is LegalMatch. The following screenshots are from this company's website.

(<http://www.legalmatch.com/m.html>, accessed 11/6/13).



http://www.legalmatch.com/attorneys/home.html Attorneys - Find New Client...

File Edit View Favorites Tools Help  
X Convert Select

Call Now: (866) 953-4259 [Learn More](#) [Tour](#) [Log In](#)

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Case	Location	Received	Handled	Status
Case 1010	Freemont, CA	09/29/2010	09/29/2010	Open
Need to file bodily injury claim	Alhambra, CA	09/08/2010	09/08/2010	Open
Birdbug attack	Concord, CA	09/07/2010	09/08/2010	Open
Got harassed at work and have photographs/video	San Jose, CA	09/07/2010	09/08/2010	Open
Bicycle Car accident	Concord, CA	09/07/2010	09/07/2010	Open
Sick building Syndrome related injuries	Alameda, CA	09/07/2010	09/07/2010	Open
MOLD DETECTED IN MY APARTMENT	Hayward, CA	09/07/2010	09/07/2010	Open
workless comp				

Cases in your practice area

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*"The LegalMatch system has proven itself and I'm still an active member after all of these years."*  
- Mazyar in Chicago, IL



*"I increased my number of clients, raised my revenue, and got an Internet presence."*  
- Alan in Kansas

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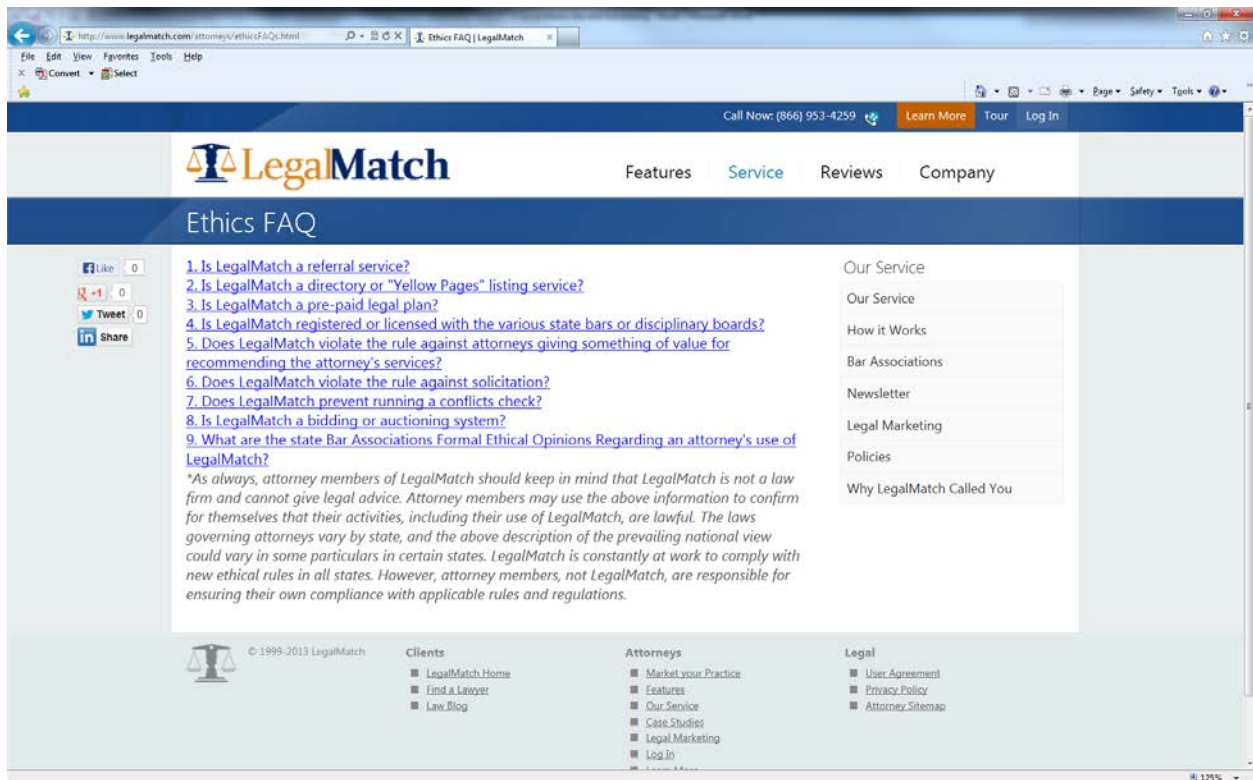
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According to its website, a number of states have reviewed LegalMatch favorably from an ethical perspective and the FTC has provided an opinion endorsing online legal matching.



Its Ethics FAQ page addresses a number of ethical issues, including whether the service is a pre-paid legal plan, whether the service violates the rules of attorneys giving something of value for recommending an attorney's services, whether LegalMatch violates the rule against solicitation, whether LegalMatch prevents running a conflicts check and whether LegalMatch is a bid or auction system. This page also discusses the ethics opinions from six states (South Carolina, Texas, Rhode Island, Ohio, North Carolina and Utah).



Here is what the public sees when beginning to search for an attorney:





The ethics of participating in an online attorney-client matching service are discussed from the perspective of California's Rules of Professional Conduct by Borodkin and Gagnier. (Borodkin, L.J. and Gagnier, C.M. The ethics of online referrals. *California Lawyer*, Nov. 2011, <http://www.callawyer.com/clstory.cfm?pubdt=201111&eid=918775&evid=1>, accessed 11/5/13). Among the ethical issues covered in this article are that users are bound by the terms of service agreement, thus the burden is on the attorney to be sure that the terms are in compliance with a number of rules, including ABA Model Rule 5.5 regarding multijurisdictional practice, Rule 7.1 on false and misleading communications, Rule 7.4 on promotion of practice area specialization and Rule 1.18 on duties to prospective clients (confidentiality). (Id.) The authors caution that:

The potential efficiency of these revolutionary websites may tempt attorneys to be less vigilant about ethical issues. In an economy that has left many lawyers searching for work - especially young lawyers new to the profession - such sites seem like a tantalizing



way to find clients. But they may inadvertently leave the relationship element of the attorney-client interaction by the wayside. Also, the pro forma contractual service terms of sites like LawPivot and Shpoonkle may leave participating lawyers with more liability than they counted on. So refresh your command of the ethics rules, not just your browser. (Id. at 2).

Carolyn Elefant's myShingle.com blog recent addressed some important considerations with respect to using attorney-client matching services. (Elefant, C. Are data-driven matches between lawyers and clients always made in heaven? *myShingle.com*, <http://myshingle.com/2013/01/articles/trends/are-data-driven-matches-between-lawyers-and-clients-always-made-in-heaven/>, accessed 11/5/13). Not only is Ms. Elefant skeptical of the power of algorithms, data mining and data aggregators to construct a good match and concerned about confidentiality, but she also notes that "lawyers often get the clients they market for."

In other words, if you label yourself as a "bargain basement lawyer," don't be surprised when most of your clients complain about your rates or haggle over price. If you bill yourself as a pit bull lawyer who doesn't take no for an answer, you may attract strident clients who won't take no for an answer when you try to explain why a particular strategy won't work. Still, an enormous space lies between the ideal client and clients from hell — and we may find a way to effectively represent many of the clients in that middle space even though a computer program wouldn't necessarily have matched us. After all, as lawyers, that's what we do: find a way to work with people — from opposing counsel to judges who don't necessarily share our life views, personality or skills — so that we can effectively represent our clients. (Id. at 2-3).

A blogpost that is generally favorable to the concept of lawyer matching services, but notes that a such sites would be even more effective if they went beyond matching to actually screen the good lawyers from the bad. (Camara, K.A.D. Lawyer matching services. *Discovery: The DISCO Blog*, Mar. 17, 2013, <http://blog.csdisco.com/2013/03/17/lawyer-matching-services/>, accessed 11/5/13). Unfortunately, the blog ends with some disturbing commentary on the quality of legal services available:

A few words about quality control for nonlawyers: checking for bar membership and bar discipline is nowhere near enough. Unfortunately, in the United States, it is easy to become a lawyer and there is little or no postgraduate specialization or training as there is

for doctors. The kinds of things that can be routinely checked are not adequate indicia of quality. And clients can judge bedside manner, but not the quality of the surgery; unlike real surgery, the results of bad lawyering may not show for years in litigation and longer in transactions. This is why the quality-control function of law firms is so important, because, until better technology is developed, only senior lawyers who are themselves good can tell what lawyers are good and can teach them how to be better. (Id.)

Attorneys in Indiana who are interested in participating in attorney-client matching services should first review the applicable Indiana Rules of Professional Conduct and then compare these rules with the terms of service of the vendor to be sure that they are in compliance. Reviewing the ethical opinions from other states provided through the LegalMatch website may also be helpful.

Indiana Rules of Court  
**Rules of Professional Conduct**  
*Including Amendments made through January 1, 2013*  
([http://www.in.gov/judiciary/rules/prof\\_conduct/prof\\_conduct.pdf](http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf), accessed 11/6/13)

**Rule 7.2. Advertising**

- (a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term “advertise” as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.
- (b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer's services except that a lawyer may:
  - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service described in Rule 7.3(d);
  - (3) pay for a law practice in accordance with Rule 1.17; and
  - (4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
    - (i) the reciprocal referral agreement is not exclusive, and
    - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. The lawyer or law firm responsible for the content of any communication subject to this rule shall keep a copy or recording of each such communication for six years after its dissemination.

## Commentary

[4] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

### **Rule 7.3. Direct Contact with prospective Clients**

- (d) A lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any lawyer referral service unless such service falls within clauses (1)-(4) below. A lawyer or any other lawyer affiliated with the lawyer or the lawyer's law firm may be recommended, employed, or paid by, or cooperate with, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's firm, if there is no interference with the exercise of independent professional judgment on behalf of a client of the lawyer or the lawyer's firm:
  - (1) A legal office or public defender office:
    - (A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;
    - (B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;
    - (C) operated or sponsored on a not-for-profit basis by a governmental agency;
    - (D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Defense Trial Counsel of Indiana, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission; and
    - (E) operated by a Circuit or Superior Court within the State of Indiana.
  - (2) A military legal assistance office;
  - (3) A lawyer referral service operated, sponsored, or approved by any organization listed in clause (1)(D); or
  - (4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:
    - (A) the primary purposes of such organization do not include the rendition of legal services;
    - (B) the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;
    - (C) such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and
    - (D) the member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.
- (e) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of paragraph (d) above.

E. What Are the Ethical Rules of Linking the Law Firm Website to a Non-Legal Entity and Vice Versa?

ABA Formal Opinion 10-457 covers websites for lawyers. (ABA Formal Opinion 10-457, Lawyer Websites, Aug. 5, 2012,

[http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10\\_457.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf),

accessed 11/5/13). The opinion covered website content (information about lawyers, their law firms or their clients), information about the law, inquiries from visitors to the website and warnings or cautionary statements that are intended to limit, condition or disclaim a lawyer's obligations to website visitors. (Id.) Of course, the world of the web has changed significantly since 2010, with law firms and every other kind of company, non-profit organization or government agency now relying nearly exclusively on websites and other technology-enabled venues for communication with current and future clients, colleagues and the public as a whole. One of the major considerations with website development is search engine optimization (SEO), which is intended to boost the position of a website to the top of a list when a user searches Google or other search engine. It is unlikely that a user, unless very motivated or clear about what he/she is looking for, will go beyond the first list of websites delivered through a search engine. Links are an important factor in search engine optimization and there are many resources for using links strategically in website development.

Links are the "money" of the Internet; you want lots of links. Inbound links show that your site is reputable -- something which Google likes. The more inbound links you have, the higher your site will be ranked in search. Getting your website listed on business directories and in media coverage (blogs, online magazines, and news sources) are great ways to build up inbound links. (Khorasane, G. Law firm website SEO 101: Tags, keywords, links and more. Strategist: The FindLaw Law Firm Business Blog, Sept. 30, 2013, <http://blogs.findlaw.com/strategist/2013/09/law-firm-website-seo-101-tags-keywords-links-and-more.html>, accessed 11/5/13).

Likewise, Tsakalaskis offers a number of suggestions for selecting links for a law firm's website, including a top-down approach for prospecting for links, competitive intelligence, local linking opportunities and developing content that other sites will want to link to. (Tsakalaskis, G. Law firm link sources. *Lawyerist*, Jul. 11, 2011, <http://lawyerist.com/law-firm-link-sources/>, accessed 11/5/13. *See also* Ramsey, M. How to design the best law firm website. *Attorney at Work*, Sept. 11, 2013, <http://www.attorneyatwork.com/how-to-build-the-best-law-firm-website-design/>, accessed 11/5/13). A recent study indicates that LinkedIn may be the biggest way to generate traffic to law firm websites, although Twitter is gaining in influence. (O'Keefe, K. LinkedIn drives more traffic to law firm websites than all other social media combined. *Real Lawyers Have Blogs*, Oct. 22, 2013, <http://socialmediatoday.com/steve-rayson/1841146/linkedin-drives-more-traffic-corporate-websites-all-other-social-sites-combined>, accessed 11/5/13).

Giroux notes that to be successful, a law firm should integrate its offline relationships with its online presence. (Giroux, J. Build your law firm website links naturally. *LawWebMarketing.com*, Dec. 5, 2012, <http://www.lawwebmarketing.com/2012/12/build-your-law-firm-website-links-naturally>, accessed 11/6/13). Among the suggestions he makes for developing links are the firm's individual, professional and community relationships, its involvement with charities and non-profit organizations and its brand authority, which he defines as the collective knowledge, skills expertise, and image that the lawyer, the firm and the firm's employees possess and display. (Id.) While striving to be at the top of a search list is an important goal, the attorney may still want to be mindful of the saying that "you are judged by the company that you keep." While there is little control over websites that choose to link to the law firm's website, an attorney will want to make sure that listings of - or links to - its website in any marketing, matching or directory-type sites is not only worth the financial investment

required (and be able to measure the ROI), but that they are in compliance with the Indiana Rules of Professional Conduct regarding advertising. In terms of links on the law firm's own website, these should be chosen with care, not only for search engine optimization (SEO), but also so that they are consistent with the image that the law firm wants to portray and that these sites contain high-quality information that will be helpful to clients and potential clients. It is also important to avoid linking to websites that appear to be violating copyright law.

#### F. Can Testimonials Be Considered Ethically-Compliant Advertising?

According to the Indiana Rules of Professional Conduct, attorneys must be especially careful when using testimonials as part of an advertising plan. One of the risks of testimonials is that they can create expectations in the client's or other party's mind about the results that can be achieved by using the attorney's or law firm's services. There are so many nuances to cases that may appear similar or situations that may be comparable, which attorneys appreciate, but which may be difficult for those without legal training to comprehend. The risks with testimonials as well as other popular advertising methods, such as endorsements and dramatizations, are illuminated in the Comments to Rule 7.1 in the Indiana Rules of Professional Conduct.

Indiana Rules of Court  
**Rules of Professional Conduct**  
*Including Amendments made through January 1, 2013*  
([http://www.in.gov/judiciary/rules/prof\\_conduct/prof\\_conduct.pdf](http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf), accessed 10/25/13)

#### **Rule 7.1. Communications Concerning a Lawyer's Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

#### **Commentary**

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

- (1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
- (2) contains statistical data or other information based on past performance or an express or implied prediction of future success;
- (3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;
- (4) appeals primarily to a lay person's fear, greed, or desire for revenge;
- (5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;
- (6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;
- (7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;
- (8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights;
- (9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;
- (10) is prohibited by Rule 7.3.

Although the focus is on California, King provides a brief history of attorney advertising and provides a discussion of how this impacts social media, including online testimonials, requirements for disclaimers, blogging, communication about prior results and the interplay between the First Amendment and the regulation of attorney speech. (King, J. Social media and attorney advertising. *California Lawyer*, June 2012,

<http://www.callawyer.com/clstory.cfm?pubdt=201206&eid=922755&evid=1>, accessed 11/5/13).

His conclusion is that “[p]rovided that California attorneys aren't engaging in deception, they should have few concerns that a technicality will trip up their constitutionally protected right to express themselves via social media.” (Id.) (*See also* Hudson, D.L., Jr. Commercial ahead:

Virginia Supreme Court holds that advertising rules may be applied to a lawyer's blog. *ABA Journal*, Nov. 2013, pp. 20-21, and Abrogio, R. Do LinkedIn endorsements violate legal ethics? *Robert Ambrogio's LawSites*, May 20, 2013, <http://www.lawsitesblog.com/2013/05/do-linkedin-endorsements-violate-legal-ethics.html>, accessed 11/5/13).